

DOCKET FILE COPY ORIGINAL

RECEIVED

JUL 15 1996

FEDERAL

COMMUNICATIONS
COMMISSION
OFFICE OF SECRETARY

BEFORE THE
Federal Communications Commission
WASHINGTON, D C.

In the Matter of

Examination of Current Policy
Concerning the Treatment of
Confidential Information
Submitted to the Commission

GC Docket No. 96-55

REPLY COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS, INC.

Brian Conboy
John McGrew
Thomas Jones

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

**ATTORNEYS FOR TIME WARNER
COMMUNICATIONS HOLDINGS, INC.**

July 15, 1996

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION AND SUMMARY	1
II. IT IS CRITICALLY IMPORTANT THAT TARIFF COST SUPPORT DATA CONTINUE TO BE PUBLICLY AVAILABLE.	3
III. THE COMMISSION SHOULD REJECT ILEC PROPOSALS TO FURTHER RESTRICT ACCESS TO COST SUPPORT DATA.	4
A. The "Persuasive Showing" Standard Should Not Be Made More Stringent.	4
B. Cost Support Information Should Not Be Presumed To Be Confidential.	5
C. Interested Parties Should Not Be Required To Obtain Access To Confidential Information Through An Independent Auditor.	6
IV. CHANGES RECOMMENDED BY ILECS TO THE MODEL PROTECTIVE ORDER ARE UNNECESSARY AND OVERLY RESTRICTIVE.	7
A. The Model Protective Order Proposed By SBC Should Be Rejected.	7
B. There Is No Need To Include In The Model Protective Order Penalties For Violations Of Its Terms.	9
C. Further Restrictions On "Authorized Representatives" Are Harmful And Unnecessary.	11
D. Interested Parties Should Be Permitted To Make Copies Of Confidential Information.	12
V. CONCLUSION	13

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
Examination of Current Policy)	
Concerning the Treatment of)	GC Docket No. 96-55
Confidential Information)	
Submitted to the Commission)	

REPLY COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS, INC.

Time Warner Communications Holdings, Inc. ("TWComm"), by its attorneys, hereby submits its reply to initial comments submitted in response to the Commission's Notice of Inquiry and Notice of Proposed Rulemaking in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

As in TWComm's initial comments, these reply comments focus on issues related to incumbent LEC ("ILEC") requests for confidential treatment of information submitted in tariff review proceedings and other regulatory proceedings with respect to the pricing, terms, and conditions under which ILECs provide facilities and services to their competitors such as TWComm. Specifically, TWComm urges the Commission to retain, especially during the transition to competition, its basic policy of making

¹ See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, GC Docket No. 96-55, Notice of Inquiry and Notice of Proposed Rulemaking (released March 25, 1996) ("Notice").

tariff cost support data submitted by dominant firms available for review and comment by interested parties.

Adoption of proposals that would deny or severely restrict interested parties access to such data will only serve to undermine the Commission's ability to conduct an effective review of proposed ILEC charges. The need for careful scrutiny of cost data used to support ILEC prices for services offered to would-be competitors is more important than ever during this critical period of transition to a competitive marketplace for local services. Accordingly, the Commission should resist ILEC efforts to deny or impose inappropriate restrictions on access to such information. In particular, the Commission should deny ILEC requests to (1) heighten the "persuasive showing" standard in Section 0.457(d)(2)(i) of the Commission's rules,² (2) establish a presumption of confidentiality for cost support information, and (3) require interested parties to obtain access to confidential information through a third party auditor. The Commission should also adopt, with the minor modifications recommended in TWComm's initial comments, the protective order proposed in the Notice and reject the numerous ILEC proposals to make the proposed order more restrictive.

² 47 U.S.C. § 0.457(d)(2)(i).

**II. IT IS CRITICALLY IMPORTANT THAT TARIFF COST SUPPORT DATA
CONTINUE TO BE PUBLICLY AVAILABLE.**

As TWComm explained in its initial comments, interested parties play a crucial role in tariff review proceedings.³ To perform that role, they must of course be able to obtain access to cost data submitted in support of ILEC tariffs.

Several of the ILEC interests assert in their comments, however, that, as a general matter, the harm to competition caused by disclosure of cost support information now outweighs the benefits of the traditional FCC policy of public review of the dominant firms' prices and the cost information submitted in support of those prices.⁴ In particular, the ILECs seem to be saying that the public interest is better served by preventing full review of their proposed prices (where such review is permitted under the Commission's rules) because there is some chance that a new entrant, with negligible market share, may be able to use publicized information to their competitive advantage.

But the ILECs have it backwards. The public interest, now more than ever, requires full disclosure of and review of ILEC cost support information. Unreasonably high prices charged by ILECs to their competitors pose a far more serious threat to competition than does the possibility that a competitive LEC ("CLEC") will somehow abuse its access to information supplied by

³ See Comments of TWComm at 3-4

⁴ See Comments of Cincinnati Bell at 3; Comments of Joint Parties at 2, 4-5; Comments of SBC at 5-6

the incumbent for competitive gain. This is not to say, of course, that truly proprietary information should not be subject to appropriate protection. But the Commission should reject the ILECs' suggestion that the clear public interest in full disclosure is now outweighed by their self-interested desire to deny or inappropriately restrict access to tariff cost support information, and thereby undermine effective regulatory review.

III. THE COMMISSION SHOULD REJECT ILEC PROPOSALS TO FURTHER RESTRICT ACCESS TO COST SUPPORT DATA.

Consistent with their general opposition to disclosure of cost support data, the ILECs propose several means of restricting public access to this information. These attempts to limit review of incumbent prices to the FCC alone should be rejected.

A. The "Persuasive Showing" Standard Should Not Be Made More Stringent.

Cincinnati Bell argues that the requirement in Section 0.457(d)(2)(i) of the Commission's rules⁵ that parties seeking access to information deemed confidential by the Commission make "a persuasive showing as to the reasons for inspection" is inadequate.⁶ But, as the Commission observed in the Notice, the

⁵ 47 C.F.R. § 0.457(d)(2)(i).

⁶ For example, Cincinnati Bell states that the "persuasive showing" standard "is no longer adequate in light of the current competitive environment and accordingly requests that the Commission adopt a higher threshold for disclosure." Comments of Cincinnati Bell at 2. It should also be noted that the Joint Parties suggest an interpretation of the persuasive showing standard that includes the requirement that parties prove that "a compelling public interest would be served by permitting

Commission grants access to information under the "persuasive showing" standard "only in very limited circumstances."⁷

Proposals to further limit the possibility for disclosure under this standard would render it a virtual prohibition against disclosure. Such a standard would violate the strong public interest in allowing interested parties to participate in the review of prices proposed by dominant firms.

B. Cost Support Information Should Not Be Presumed To Be Confidential.

Several ILECs argue that cost support data should be presumed to be confidential.⁸ Again, this approach subverts the crucial public policy favoring the fullest possible disclosure in tariff proceedings at exactly the time when that policy is most useful to the development of competition. Placing the burden of proof on interested parties would force would-be competitors to incur in every instance the added expense of requesting Commission disclosure of even the most obviously public information. Moreover, to the extent that the adoption of a presumption against disclosure operates to deny or limit access to the relevant data, the end result would be that regulatory review of ILEC rates will be less complete and less reliable.

access." See Comments of the Joint Parties at 5. The addition of the term "compelling" could be read to make the standard more difficult to meet than would otherwise be the case.

⁷ See Notice at ¶ 21.

⁸ See Comments of SBC at 7; Comments of Cincinnati Bell at 3.

C. Interested Parties Should Not Be Required To Obtain Access To Confidential Information Through An Independent Auditor.

Cincinnati Bell suggests as an alternative to disclosure the possibility that interested parties obtain "access" to cost support information through a procedure similar to the one used to protect the Bellcore Switching Cost Information System ("SCIS").⁹ Under the SCIS procedure, the Commission required that parties seeking access to certain information submit questions to independent auditors retained by the BOCs.¹⁰ The auditor in question then responded to questions without disclosing the underlying information.¹¹

This mechanism for providing access to purportedly confidential information suffers from several serious defects. As an initial matter, information filtered through a third party can never be as reliable as the information itself. The inability to directly access the information necessarily limits the ability of interested parties to properly frame the questions necessary to effectively analyze the ILEC's cost support data. Moreover, an independent auditor's responses to interested parties' requests are inevitably influenced by subjective a priori assumptions. The resulting "gloss" will in turn

⁹ See Comments of Cincinnati Bell at 3-4.

¹⁰ See Commission Requirements for Cost Support Material To Be Filed With Open Network Architecture Access Tariffs, 7 F.C.C.R. 1526 at ¶¶ 66-69 (1992).

¹¹ See id.

necessarily limit interested parties' ability to analyze fully the information in question. In addition, requiring review by an independent auditor inevitably will delay the tariff review process. This is especially so where many parties submit questions to the auditor (presumably fairness requires that there be only one auditor for all parties). Thus, the approach adopted to the SCIS context, while perhaps appropriate in the most unusual cases, is inappropriate for conventional ILEC tariff review proceedings.

IV. CHANGES RECOMMENDED BY ILECS TO THE MODEL PROTECTIVE ORDER ARE UNNECESSARY AND OVERLY RESTRICTIVE.

The ILECs suggest a wide array of changes to the Commission's proposed protective order, virtually all of which are designed to restrict access to and review of the underlying data. The Commission should reject these requested changes and adopt its proposed protective order with the slight changes suggested by TWComm in its initial comments.

A. The Model Protective Order Proposed By SBC Should Be Rejected.

SBC recommends that the Commission adopt a model protective order similar to one purportedly used by the Texas PUC.¹² The order proposed by SBC is highly restrictive and places tremendous burdens on parties seeking access to information and should therefore be rejected.

¹² See Comments of SBC at Exhibit A.

For example, the SBC protective order includes three categories of confidential information: "Confidential Information," "Highly Sensitive Confidential Information," and "Highly Sensitive Confidential Information - Restricted." The procedures for protecting "Confidential Information" alone provide more than adequate protection for any purported interests of the submitting party. Moreover, the restrictions placed on "Highly Confidential Information" (1) limiting availability to the producing party's Austin, Texas (or presumably other) office, (2) only allowing access by the taking of notes, (3) treating notes as themselves "Highly Sensitive Confidential Information," and (4) limiting access to counsel and outside consultants in certain cases¹³ are unduly burdensome unnecessary to protect a submitting party's legitimate interests, and would impede adequate review by interested parties. Finally, under SBC's proposal, interested parties would not obtain any access to information classified as "Highly Confidential Information - Restricted," thus defeating the purpose of a protective order entirely.¹⁴

There is no reason for the Commission to establish such a restrictive and burdensome regime for protecting confidential information.¹⁵ The protective order proposed in the Notice

¹³ See id. at 7-8.

¹⁴ See id. at 8.

¹⁵ It should be pointed out that there are other aspects of the SBC Order that are overly restrictive. For example, SBC

strikes the balance between disclosure and the protection of confidential information far more effectively.

B. There Is No Need To Include In The Model Protective Order Penalties For Violations Of Its Terms.

Cincinnati Bell and the Joint Parties recommend including specific penalties in the protective order for violations of its terms.¹⁶ These suggested changes are unnecessary because current law establishes a broad range of sanctions which the Commission and federal courts may apply to persons who violate Commission orders.

With regard to attorneys, for example, the Commission has the authority to censure, suspend, or disbar any federal communications attorney who has breached standards of "ethical conduct" or lacks "character or professional integrity."¹⁷ Thus, if an attorney practicing before the Commission were to sign, then violate the model protective order, the Commission currently

proposes to restrict the number of copies that a submitting party must make for an interested party to 200. See id. at 5. But there is no reason why interested parties could not themselves pay for copies in excess of 200 pages rather than establishing an outright bar on such "voluminous" copying.

¹⁶ See id. at 4-5 (suggesting liquidated damages provision), Comments of the Joint Parties at Appendix A, p.3 (suggesting more specific sanctions, including monetary forfeitures and denial of access to confidential information in other proceedings). See also id. at 2 (suggesting that each recipient of the information "sign an enforceable acknowledgment of the obligations imposed by the non-disclosure agreement directly with the submitter of the information, providing for injunctive relief and liquidated damages").

¹⁷ 47 C.F.R. § 1.24(a).

has the authority to censure, suspend, or disbar that attorney.

Under the Communications Act, the Commission may also sanction persons who willfully violate its orders.¹⁸ After notice and hearing,¹⁹ the Commission may impose an appropriate fine²⁰ and the Attorney General may prosecute any person who fails to pay such a fine.²¹ In addition, the Attorney General, the Commission, or any injured party may initiate an enforcement action in federal district court against a person who violates a Commission order.²²

The model protective order, when signed by a party to a proceeding, would presumably be a Commission order violated subject to the provisions described above. It would be issued pursuant to the Communications Act²³ and would be an action by

¹⁸ See 47 U.S.C. § 503(b)(1)(B). This Section applies to persons who hold a "license, permit, certificate, or other authorization issued by the Commission" as well as certain applicants for such authorization. It also applies to a person to whom the Commission has issued a warning and who has subsequently engaged in the activity that was the subject of the warning. See *id.* at § 503(b)(5), (6).

¹⁹ See 47 U.S.C. § 503(b)(3)(A), (b)(4).

²⁰ See 47 U.S.C. § 503(b)(2) (establishing the factors which the Commission must consider in deciding the amount of the fine, which may be capped at between \$10,000 and \$1,000,000, depending on the violator).

²¹ See 47 U.S.C. § 503(b)(3).

²² See 47 U.S.C. § 401(b), (c). See also 47 U.S.C. § 502 (imposing a fine of \$500 for each day of the offense, in addition to any other fines imposed under the Act).

²³ See Notice at Appendix A, ¶ 17 (Protective Order issued pursuant to Section 4(i) of the Communications Act and 47 C.F.R. § 0.457(d)).

the Commission.²⁴ Thus, a signatory to the protective order who violates its terms would be subject to a broad range of penalties, including fines imposed by the Commission or a federal court.

In sum, existing law provides the Commission with more than adequate powers of enforcement in the event that a party to a model protective order violates its terms.

C. Further Restrictions On "Authorized Representatives" Are Harmful And Unnecessary.

Cincinnati Bell requests that interested parties submit the names and resumes of "authorized representatives" to the submitting party for approval,²⁵ and the Joint Parties seek to limit the number of people who may have access to confidential information to seven.²⁶ Both of these suggestions are based on a presumption that interested parties cannot be trusted to comply with the terms of a protective order. There is no basis in the record for this presumption. Further, the enforcement mechanisms described above provide adequate deterrence against violating the order.

²⁴ The Declaration of the signatory states that the protective order is "entered by the Commission." See Notice at Declaration at ¶ 18.

²⁵ See Comments of Cincinnati Bell at 4.

²⁶ See Comments of the Joint Parties at Appendix A, p.1 (suggesting that only "one in-house counsel, one outside counsel, one paralegal, one secretary, two in-house subject matter experts and one outside consultant" should be able to obtain access to the information)

Of equal importance is the fact that these restrictions will impose added burdens on the Commission and on parties seeking to participate in tariff review proceedings. This is particularly true of the seven person limit suggested by the Joint Parties. To require interested parties to seek approval every time they must exceed the proposed limit, which is likely to occur frequently, simply adds to the cost and delay of analyzing cost support information.

D. Interested Parties Should Be Permitted To Make Copies Of Confidential Information.

Finally, the Joint Parties also suggest that no copies be made of the confidential information.²⁷ This request is again premised on the unfounded presumption that interested parties cannot be trusted to comply with applicable restrictions on the disclosure of information. Moreover, imposition of this restriction would severely constrain interested parties' ability to participate meaningfully in the review proceedings.

²⁷ See id. at 3.

V. CONCLUSION

The Commission should adopt rules regarding the treatment of confidential information, consistent with TWComm's initial comments and these reply comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brian Conboy", written over a horizontal line.

Brian Conboy
John McGrew
Thomas Jones

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

**ATTORNEYS FOR TIME WARNER
COMMUNICATIONS HOLDINGS, INC.**

July 15, 1996